STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EN26GB-66692

Heather Kelley,	)	
	)	
Complainant,	)	
	)	
v.	)	**Administrative Action**
	)	**FINDING OF PROBABLE CAUSE**
Above & Beyond Unlimited Cleaning, Inc.,	)	
	)	
Respondent.		

On April 27, 2017, Heather Kelley (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that her former employer, Above & Beyond Unlimited Cleaning (Respondent), discriminated against her based on pregnancy in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A 10:5-1 to -49. Respondent denied the allegations of discrimination in their entirety. DCR's ensuing investigation found as follows.

Summary of Investigation

Respondent is a 24-hour emergency service company located in Monmouth County, New Jersey, which offers a variety of services including flood-damage cleanups, mold remediation, and basement waterproofing. Complainant told DCR that in April 2016, Respondent's owners, Naudine and Carl Bennett,[1] hired her to work as an office manager.[2] The investigation showed that Complainant stopped working for Respondent in early November 2016.

In the verified complaint, Complainant alleged that Respondent discriminated against her based on pregnancy. Specifically, she claimed that after she informed Respondent of her pregnancy on July 26, 2016, Respondent reduced her hours during the period between July 31, 2016 and November 4, 2016. During the course of the investigation, Complainant provided facts that raised a possible claim that Respondent's decision to reduce her hours was also based on her marital status and that she was subjected to a religiously hostile work environment. Respondent was informed by the DCR investigator during an interview that DCR was investigating those

[1] Since Naudine and Carl Bennett share the same surname, for clarity they will be referred to in this disposition as "Naudine" and "Carl."

[2] As noted below, Respondents denied that Complainant worked as an office manager and stated that Complainant was in training the entire time she worked for them. Complainant provided DCR with several email chains from her employment with Respondent wherein her signature line listed her title as "Office Manager." This dispute is not relevant to this disposition.

allegations. The complaint is therefore amended to add allegations of differential treatment based on marital status and a hostile work environment based on creed. N.J.A.C. 13:4-2.9.

Complainant stated that originally Carl scheduled her to work a 40-hour week, with shifts on Monday, Tuesday and Wednesday from 8 a.m. to 3 p.m., Thursday and Friday from 9 a.m. to 6 p.m., and Saturdays at various times as needed, to make sure the crew was out for the jobs assigned for the weekend. Complainant told DCR that when she was first hired, she asked to work a later schedule on Fridays to arrange for dropping off her child, and that the Bennetts scheduled her for the same hours on Thursdays as well.

Complainant said that on July 26, 2016, she informed Carl that she was pregnant and was due in February of 2017. She recalled that Carl asked her to go outside to discuss her pregnancy. Complainant said during that conversation, Carl said that he is a devout Christian and asked Complainant about her marital status, her future intentions with regard to marriage, and mentioned that she already had one child out of wedlock. Complainant told DCR that Carl's questions and comments made her emotional, and she was sobbing because he made her feel that she was doing something that wasn't right. She could not recall their exact words, but recalled asking rhetorically, "what am I supposed to do because I am not married?" Complainant described Carl as unsupportive and standoffish, and expressed her belief that he did not seem happy that she was pregnant.

Complainant told DCR that after she informed Carl and Naudine of her pregnancy, Respondent reduced her hours to Monday through Friday 10 a.m. to 3 p.m. and that her hours dwindled further when the Bennetts began taking her off of the schedule at the last minute. Complainant stated that Naudine, Carl, and their daughter-in-law, Respondent's other office receptionist, Faith Clemonts-Bennett, would send Complainant last minute text messages instructing her not to come in on certain days or explaining that work was slow, so Respondent needed her for only a couple of hours. She provided DCR with two text message chains showing that Respondent reduced her hours at the last minute.

Complainant said that after she worked a full day on November 2, 2016, Naudine told her not to come in on November 3 or 4, 2016.

Complainant told DCR that she intended to continue working until sometime in January, but the Bennetts did not ask her when she planned to begin pregnancy or maternity leave, and she did not give them a date. Her plans changed when her doctor recommended that she begin medical leave on November 7, 2016, due to medical conditions related to her pregnancy. Complainant stated that she stopped in the office on November 4, 2016, to pick up her check and to give Respondent disability paperwork. Complainant said that she told Naudine that she would return on Friday November 7, to pick up the paperwork. Both Complainant and Naudine told DCR that on November 4, Naudine gave Complainant a copy of Respondent's Rules and Regulations and asked her to sign for them. Naudine told DCR that Complainant said that she would not sign them, because she did not intend to return to work after her maternity leave. Complainant disagreed with Naudine's account - she told DCR that the documents were in an envelope that Naudine gave her, but she did not even open it until after she left the office and said nothing to Nadine about not signing them.

Complainant recalled that when she returned to the office on November 7 to pick up the disability paperwork, Carl tossed the papers to her across the desk, and she saw that the employer's portion had not been completed. She then told Carl that the employer was required to complete a section of the disability form, and he said that he did not have to do anything, and would let the State contact him. Complainant said that after November 7, she did not return to the office.

In its position statement, Respondent stated that it decided to reduce Complainant's hours between July 31, 2016 and November 4, 2016, because business was slow. Respondent further contended that Complainant frequently called out or was late to her shifts, thereby voluntarily reducing her own hours. In addition, Respondent asserted that Complainant requested to have her hours reduced so that she could care for her son each morning. DCR asked Respondent for Complainant's time records starting in April 2016, but Respondent only turned over records starting July 29, 2016.

In an interview with DCR, Naudine denied Complainant worked as an officer manager and said Complainant was in training the entire time she worked for them. Carl recalled that on or around July 26, 2016, Complainant asked that he come outside of the building, where she told him she was pregnant. Carl said that Complainant was very emotional while doing so. He denied making any comments to Complainant about her having children out of wedlock, her marital status, whether she intended to get married, or his own religious beliefs. He said that he was not upset that Complainant was pregnant and noted that Respondent granted Clemonts-Bennett leave for her pregnancy in early 2017. Carl stated that he did not recall the specifics of what he said to Complainant about her pregnancy during the conversation.

Carl and Naudine told DCR that at the beginning of August 2016, Complainant was scheduled to work from 8 a.m. to 3 p.m., but that Respondent changed her hours to 10 a.m. to 3 p.m., at Complainant's request. They stated that Complainant asked for the reduced hours because she had to pick up her son each morning. Complainant contradicted this statement, telling DCR that she never requested any reduced hours, and that the only request she made was to start at 9 a.m. and work until 6 p.m. on Fridays, when she needed to drop off her son.

Respondent did not produce any evidence supporting its assertion that it reduced Complainant's hours at her request. On the other hand, Complainant produced a chain of text messages dated July 31, 2016, in which Naudine told Complainant to come into work at 10 a.m. on August 1 because she was trying to get the schedule in order. Complainant provided additional text messages from Nadine on August 1, 2016, telling Complainant not to come in on August 2, 2016 because business was slow.

In an interview, Respondent's office manager [redacted] told DCR that she worked with Complainant only during October 2016 because she was out on leave for the remainder of Complainant's employment. [redacted] told DCR that all of the employees worked part time hours. She asserted that Complainant would call out and show up late frequently, usually because she had to pick up her son. [redacted] could not provide specific dates or information regarding such call outs, or any documentation to support her statements about Complainant's attendance.

Clemonts-Bennett told DCR that Complainant was a part time employee. She stated that Respondent changed Complainant's hours at her own request because the father of her child could not pick up her son from school.

Naudine also contended that between July and November 2016, Respondent's business was slow, so she would text message Complainant to tell her not to come in or that she was only needed for a few hours a day. However, Clemonts-Bennett disagreed that Respondent reduced anyone's hours because business was slow.

After multiple requests from DCR, Respondent eventually produced documents entitled, "Sales by Product/Service Summary," which revealed the following monthly summaries of sales totals:

- April 2016 Total Amount ending $73,489.08.
- May 2016 Total Amount ending $109.924.93.
- June 2016 Total Amount ending $250,857.77.
- July 2016 Total Amount ending $89,322.45.
- August 2016 Total Amount ending $82,386.94.
- September 2016 Total Amount ending $117,271.60.
- October 2016 Total Amount ending $117,822.64.
- November 2016 Total Amount ending $137,779.14.

Respondent could not explain how the "Sales by Product/Service Summary" statements supported its assertion that it decreased Complainant's hours because its business was slow from July 2016 until November 2016.

With regard to her hostile work environment claim, Complainant wrote in an email to the DCR investigator that the Bennetts "forced us to watch the Christian channel daily." During an interview with DCR, Complainant clarified that Respondent had a large television in the corner of the office, mounted to the wall, on which Carl and Naudine played only a channel that discussed Christian ideas and theology. Complainant recalled that at one point she changed the channel to a jazz station, at which time Carl and Naudine told her never to change the television station because all employees had to listen to the Christian channel while at the office. Complainant told DCR that she apologized and told them that she did not know that she was not permitted to change the channel. Complainant began noticing that a televangelist's program was on every day at 11 a.m.; she told DCR that it felt like "brainwashing."

Complainant told DCR that Carl phoned her one day 15 minutes before her scheduled shift to tell her not to come to work that day. She told him that cutting her hours was a financial hardship on her family, and said that he should at least give her a consistent schedule. The next morning, Carl stated something to the effect of, "If you went to church on Sundays and made your tithings, you would not be having financial issues."

In a telephone interview with DCR, former employee [redacted] said that the Christian station was on mostly on Saturdays, and that a political news station may also have played at times. When DCR asked whether employees were permitted to change the television station, [redacted] said that no one ever said they could not change the station.

DCR conducted a telephone interview with another former employee, [redacted], who told DCR that there was a television in the office area and that the programs shown were "purely religious." [redacted] was asked if she was ever able to change the television station and replied, "I was never told I couldn't change the station, but the remote control is on the boss's desk."

On April 30, 2019, DCR met with Respondent's attorney, and Carl and Naudine Bennett. DCR asked the Bennetts if there is a television in the office where the employees work and Mr. Bennett said "yes." DCR asked the Bennetts if they played a Christian television station while the employees worked and Mr. Bennett responded "yes." Carl Bennett said that the Christian television station was on very low because the telephone was always ringing. DCR asked Carl Bennett if he ever told Complainant or other employees that they could not change the television station and Mr. Bennett said that he never told anyone that they could not change the station.

DCR also asked Carl if at any time he had a discussion with Complainant regarding giving money to the church and Carl stated "I don't speak like that and there were no discussions regarding that."

Analysis

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2(a). "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." N.J.A.C. 13:4-10.2(b).

A finding of probable cause is not an adjudication on the merits. It is merely an initial "culling-out process" in which DCR makes a threshold determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 498 U.S. 1073. Thus, the "quantum of evidence required to establish probable cause is less than that required by a complainant in order to prevail on the merits." Ibid.

The LAD makes it unlawful for any employer to treat a pregnant employee "in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work." N.J.S.A. 10:5-12(s). The LAD also precludes an employer from discriminating against an employee in "compensation or in terms, conditions or privileges of employment" based on marital status or pregnancy. N.J.S.A. 10:5-12(a).

Complainant alleges that Respondent discriminated against her based on pregnancy and marital status. Specifically, she claims that after she notified the Bennetts that she was pregnant, they substantially reduced her hours. In addition, Complainant told DCR that during the conversation in which she told Carl that she was pregnant, he inquired into her marital status and future intentions regarding marrying the father of the unborn child, and she believed the fact that she was unmarried factored into Respondent's decision to reduce her hours.

The investigation found sufficient evidence to support a reasonable suspicion that Respondent reduced Complainant's hours based on pregnancy and marital status. There is a dispute of fact regarding whether Carl made statements to Complainant about having children out

of wedlock, her marital status, whether she intended to get married, or how Complainant's decisions about these issues related to his own religious beliefs. However, it is undisputed that within one week after Complainant disclosed her pregnancy to Carl and Naudine, Respondent began to reduce her hours.

Respondent did not produce any evidence supporting its asserted reasons for reducing Complainant's hours. Respondent first claimed that it reduced Complainant's hours because business was slow. However, a review of Respondent's "Sales by Product/Service Summary" statements from April 2016 to November 2016 shows that Respondent's total sales varied in those months and demonstrated no correlation between business sales and the reduction in Complainant's hours. In addition, Clemonts-Bennett stated that she did not believe that Respondent reduced any employees' hours because business was slow.

Respondent also argued that it reduced Complainant's hours at her own request. While Carl, Naudine and Clemonts-Bennett told DCR that Complainant asked for a change in her schedule, Respondent could not offer any documentation to support this assertion. In addition, Complainant stated that she never requested a reduction in her hours, and produced text messages from Naudine to Complainant instructing her to come in late one day and not to come in the next day. Therefore, the only documentary proof produced during the investigation supports Complainant's statement that Respondent actively elected to reduce her hours even when she did not request a reduction.

In addition, Respondent at once claims that it did not decide to reduce Complainant's hours, but did so only at her request, and at the same time asserts that it did choose to reduce Complainant's hours because business was slow. Such contradictory assertions suggest that Respondent's proffered reasons for reducing Complainant's hours may be a pretext for unlawful discrimination. See, e.g.,Domiguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 432 (1st Cir. 2000) ("when a company, at different times, gives different and arguably inconsistent explanations, a jury may infer that the articulated reasons are pretextual"); Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext.").

The LAD also makes it unlawful to discriminate in the terms, conditions or privileges of employment based on "creed," or religious beliefs. N.J.S.A. 10:5-12 (a); El-Sioufi v. St. Peters University Hospital, 382 N.J. Super. 145 (App. Div. 2015); Shuchter v. N.J. Div. on Civil Rights, 117 N.J. Super. 405 (App. Div. 1971) (interpreting creed as a person's religious beliefs or principles).

A hostile work environment is a type of unlawful discrimination. See Lehman v. Toys 'R' Us, Inc., 132 N.J. 587, 607 (1993). In analyzing a claim of hostile work environment based on religion, the critical issue is whether a reasonable person of the complainant's religion would find the alleged conduct to be so severe or pervasive as to alter the conditions of employment and create a hostile or abusive working environment. Cutler v. Dorn, 196 N.J. 419, 430-31 (2008). When the conduct that allegedly created the hostile work environment is perpetrated by a supervisor, as opposed to a co-worker, its effects are magnified. See Taylor v. Metzger, 152 N.J. 490 (1998). In Taylor, the Court noted that a supervisor's "unique role in shaping the work environment" gives

him or her disproportionate power to contaminate the workplace and alter the terms and conditions of a subordinate's employment. Id. at 503.

Here, the investigation produced sufficient evidence to support a reasonable suspicion that Complainant's work environment was rendered hostile based on religion. Specifically, the investigation produced evidence that the owners of the company played religious television programs, including televangelists, on a large TV in the office. While there is a dispute of fact as to whether Carl told Complainant she could not change the channel, Carl and Naudine do not assert that they asked their employees if they were comfortable watching religious TV, or informed the employees that they were welcome to change the channel if they were not comfortable with the station. Complainant also stated that Carl made comments indicating that Complainant's financial problems were a result of her failure to tithe or attend church often enough, and referred to his own Christian faith in commenting in a negative manner on Complainant's status as a single parent and her pregnancy while unmarried. Carl denied that he made any such statements, but neither Carl nor Complainant was able to provide any documentary or other evidence regarding these alleged statements, and some of Carl and Naudine's other statements made during the investigation, including about Complainant requesting to reduce her own hours and reducing Complainant's hours because business was slow, called their credibility into question.

While the LAD does not mandate that a workplace be free of religion, courts have found that "when teachings and practices of an employer's religious sect saturate a workplace such that an employee is constantly bombarded with those teachings such a workplace may be considered hostile." Garcimonde-Fisher v. Area203 Mktg., LLC, 105 F.Supp.3d., 825, 840 (E.D. Tenn. 2015). This allegation should be resolved by a trier of fact.

At this threshold stage in the process, there is sufficient basis to warrant "proceed[ing] to the next step on the road to an adjudication on the merits." Frank, supra, 228 N.J. Super. at 56. Therefore, the Director finds probable cause to support Complainant's allegations of discrimination based on pregnancy, marital status, and creed.

Rachel Wainer Apter

Date: July 18, 2019

Rachel Wainer Apter, Director
NJ Division on Civil Rights